United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1128

To be argued by
BARBARA J. AMBLER

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1128

UNITED STATES OF AMERICA,

Appellant,

—v.—

MARIO GIGANTE, JOSEPH SARCINELLA, JOSEPH DENTI, VITO DI SALVO, DIEGO ASARO, ANGELO NOCE, DAVY TREGCAGNOLI, ALFRED BONFIGLIO, LEON BRODERSON, THOMAS VILLANOVA, MILTON WEKAR, VINCENT LANDOLFI, JOSEPH FALCO, BENJAMIN RAUGI, FRANK FORMOSA, DANNY CILENTI, JOSEPH PALERMO, GERALD GIANGREGORIO, NICHOLAS LONGO and PETER PELUSO,

Defendant-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

The United States of America appeals from an order of the Honorable Thomas P. Griesa, United States District Judge, entered in the United States District Court for the Southern District of New York on February 2, 1976, granting the motions of Mario Gigante and twenty other defendants to suppress the Government's wiretap evidence.

Indictment 75 Cr. 94, filed January 28, 1975, charged Gigante and twenty-four other defendants in two counts with conspiracy to conduct and manage an illegal gambling business and with the substantive offense, in violation of Title 18, United States Code, Sections 371 and 1955.

In October and November, 1975, twenty defendants filed motions to suppress the Government's wiretap evidence on various grounds, including the Governme 's

failure to comply with the sealing provisions of Title 18, United States Code, Section 2518(8)(a).*

Following a one day evidentiary hearing, Judge Griesa suppressed the Government's evidence, derived from seven separate wiretap orders, authorized in the Southern and Eastern districts of New York between November 10, 1972 and April 13, 1973. Although Judge Griesa found that there was no evidence that the tapes had been tampered with, he nevertheless suppressed the use of these tapes by the Government, holding (1) that the absence of seals as required by Title 18, United States Code, Section 2518 (8)(a) necessarily required the suppression of the tapes,** and (2) that the failure of the Government to name defendants DiSalvo and Falco in its affidavits seeking the November 10, 1972 and November 30, 1972 wiretap authorizations required suppression as to these two defendants of the wiretap evidence obtained from these two orders.***

Statement of Facts

During its investigation of the extensive gambling operation being conducted by the defendants herein, the Federal Bureau of Investigation placed wiretaps on nine telephones located in gambling wirerooms in the Bronx, Manhattan and Queens, pursuant to court order. Each of

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* One or more of the conversations of these twenty-one defendants was intercepted during the seven wiretaps authorized during the investigation. Each of these defendants either moved to suppress the wiretaps or joined in the motion of a co-defendant who did.

** In so holding, Judge Griesa determined the seal required by this section to be "a judicial seal issued immediately upon the expiration of the period of the order".

*** The Government is appealing from only the first ruling of the court below, not from the second ruling which relates solely to DiSalvo and Falco.

these wiretap orders was signed by the issuing judge on the following dates: November 10, 1972 (J. Gurfein); November 30, 1972 (J. Motley); December 8, 1972 (J. Gurfein); December 27, 1972 (J. Carter); February 7, 1973 (J. Tyler); March 7, 1973 (J. Ward) and April 13, 1973 (J. Bartels). (GX 1 through 7).* The tapes obtained during the November 10, 1972 order were returned to Judge Gurfein for sealing some time in December of 1972. (Tr. 30).** The tapes obtained under the remaining six orders were returned to the issuing judges on January 7 and 8, 1974. (Tr. 31-33; GX 71 through 76).

At the pre-trial suppression hearing, the Government's principal witness was Special Agent Richard Nalley of the Federal Bureau of Investigation, who had supervised the gambling investigation as well as each of the electronic surveillances. In addition, the Government offered in evidence (i) the fifty-eight original reels of tape the Government would seek to use at trial, (ii) the surveillance logs relating to each tape, (iii) the affidavit of each monitoring agent (or his live testimony), (iv) the sealing orders signed by the issuing judge for the six wiretaps returned on January 7 and 8, 1974, and (v) the supporting affidavits of Richard Nalley and Edward M. Shaw for these sealing orders.

A. The November 10, 1972 and December 8, 1972 orders

The first wiretap order, that of Judge Gurfein dated November 10, 1972, expired on November 24, 1972. (GX 1; Tr. 132). A second order, signed by Judge Gurfein

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* "GX" refers to Government Exhibits admitted into evidence at the pre-trial suppression hearing.

** "Tr." refers to the transcript of the pre-trial suppression hearing held on February 2, 1976.

on December 8, 1972, extended the November 10, 1972 order as to the same telephone number, (212) 365-1922, until December 23, 1972. (GX 3; Tr. 134).

Sometime in December of 1972, Agent Nalley and the Strike Force attorney in charge of the investigation brought the tapes obtained under the first order back to Judge Gurfein.* Each of these reels of tape had already been sealed by the Federal Bureau of Investigation, using a procedure described in greater detail below. Judge Gurfein then physically sealed the carton brought to him containing the tapes, initialled it, and directed that the tapes be kept in the custody of the Federal Bureau of Investigation. (Tr. 30 and 31; 41).

B. The remaining five orders

The remaining five orders expired on the following dates: December 14, 1972; January 10, 1973; February

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* On direct examination, Agent Nalley could not recall the exact date in December on which he delivered the tapes to Judge Gurfein; on cross-examination, he did recall that he took the tapes to Judge Gurfein before the expiration date of Judge Motley's order, that is, on or before December 14, 1972. (Tr. 98). Thus, Judge Gurfein received these tapes less than three weeks after the expiration of his first order and at least one week *prior* to the December 23, 1972 expiration of the extension period provided in his second order. (GX 3; Tr. 134).

The tapes recorded during the extension period provided by the second Gurfein order were brought to Judge Gurfein on January 7, 1974. (GX 72).

The Government did not argue at the hearing, as it does now, that the sealing of the tapes from the November 10, 1972 order was timely, and in fact told the court that it did not consider the December 8, 1972 order an extension for purposes of computing the time within which the November 10 tapes had to be sealed. (Tr. 132). This omission resulted from the failure of the Government to immediately perceive the significance of Agent Nalley's testimony on cross-examination that the sealing of the November 10, 1972 tapes must have occurred on or before December 14, 1972. Cf. *United States* v. *Tortorello*, Dkt. 75-1376 (2d Cir., April, 1976).

22, 1973; March 22, 1973; and April 27, 1973. (Tr. 133-37). The tapes obtained under each of these orders were made available to each of the issuing judges on either January 7, 1974 or January 8, 1974. In each instance, the issuing judge signed an order noting that the tapes were already in a sealed condition and directing that they continue to be maintained in said condition at the office of the Federal Bureau of Investigation. In only one instance, that of the tapes obtained under the April 13, 1973 order of Judge Bartels of the Eastern District of New York, did the judge physically seal the carton containing the tapes; in every other case, the issuing judge certified that the tapes were already being maintained in a properly sealed condition and directed that they continue to be kept at the Federal Bureau of Investigation office. (Tr. 31, 32, 33; GX 71-76).

C. The sealing procedure

In the course of his testimony, Agent Nalley explained the general procedure followed by the Federal Bureau of Investigation in sealing every tape obtained under each of the wiretap orders. This procedure was as follows:

At the beginning of his shift, each monitoring agent placed two blank reels of tapes on two recorders set up to record simultaneously. When his shift was over, or when the reels were completed, the agent removed the reels from the recorders, designated one as the original and one as the duplicate, and then immediately placed the original reel in a box which he sealed with evidence tape. The agent marked the box with the appropriate log and reel number and then initialed and dated both the box and the evidence tape itself. Finally, he turned over the original reel in the sealed box, along with the duplicate reel, to Special Agent Nalley, either the same day or as soon thereafter as possible. A chain of custody form was attached to each original reel box by the moni-

toring agent, showing the transfer of the original reel to Agent Nalley. Agent Nalley then placed the reel in a locked cabinet at the Federal Bureau of Investigation for which he had the only key. (Tr. 28, 29).

Supplementing the testimony of Agent Nalley and two other special agents, who testified to the sealing procedure used with regard to five of the tapes, were fifty-three affidavits, each corresponding to one of the fifty-three remaining tape recordings the Government wished to introduce into evidence at trial. (GX 18A-70A). Each affidavit described the procedure followed by the agent, who in each instance did both the monitoring and the sealing. These affidavits indicated that the procedures outlined by Agent Nalley were followed with respect to each tape.*

D. The sealing orders

Also introduced into evidence at the hearing were the sealing orders with respect to each of the six wiretaps obtained after the November 10, 1972 wiretap, and the accompanying affidavits of Agent Nalley and Edward M. Shaw, then Attorney-in-Charge of the New York Joint Strike Force. In each instance, Agent Nalley's affidavit detailed for the issuing judge the sealing procedures followed by the Federal Bureau of Investigation. The Shaw affidavits, after outlining these procedures went on to explain:

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* Each affidavit indicated that the affiant had physically examined the box containing the tape (in most instances within one week to one month before the hearing) and had found no evidence that the tape sealing the box had been broken or removed. In all cases the agent recognized his initials on the box and on the evidence tape around the box, thereby enabling him to identify the box.

> "I did not specifically instruct James Dougherty, the Special Attorney on my staff to whom this investigation was assigned, to obtain a court order directing the sealing of the tape recordings under the surveillance order 'immediately upon the expiration of the period of the order or extension thereof' as provided under Title 18, United States Code, Section 2518(8)(a). Mr. Dougherty left this office in June, 1973. I and the Attorney on my staff to whom I reassigned this investigation in June, 1973, at the time of Mr. Dougherty's departure, first became aware on January 3, 1974, that no such order has been obtained to date."

The Government introduced no evidence to explain Mr Dougherty's failure to have the tapes sealed prior to his departure in June, 1973.

E. Judge Griesa's findings of fact and conclusions of law

At the conclusion of the February 2, 1976 hearing below, Judge Griesa rendered the following findings of fact and conclusions of law:

1. Although Judge Griesa found that the integrity of the seals placed on the tapes by the Federal Bureau of Investigation had been maintained and that there was no evidence of tampering, he concluded that there was no satisfactory explanation for the delay in presenting the tapes to the issuing judges for judicial sealing. (Tr. 216-17). Consequently, Judge Griesa held there did not exist as to these tapes "the presence of the seal provided for by this subsection", and the tapes were ordered suppressed

pursuant to Title 18, United States Code, Section 2518 (8) (a). (Tr. 217).*

2. As to those tapes recorded pursuant to the November 10, 1972 order of Judge Gurfein, the Court below concluded that the sealing procedure employed by Judge Gurfein in December, 1972 did not comply with the requirements of Title 18, United States Code, Section 2518(8)(a). (Tr. 219-20).**

3. Judge Griesa suppressed as to defendants DiSalvo and Falco the wiretap evidence obtained pursuant to the November 10, 1972 and November 30, 1972 wiretap orders. This ruling was based upon the failure of the affidavits supporting these orders to name DiSalvo and Falco, although the Government had reason to suspect that their conversations would be intercepted. (Tr. 220).

4. The Court rejected defendants' contention that there was a violation of the minimization requirements of the wiretap statute and, moreover, held that there had been a good faith and successful effort to limit the surveillance to pertinent conversations. (Tr. 221).

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* In so ruling, Judge Griesa expressly rejected the holding of the Third Circuit in *United States* v. *Falcone*, 505 F.2d 478 (3d Cir. 1974), *cert. denied*, 420 U.S. 955 (1975), which, he conceded, supported the Government's contention that suppression was unwarranted and inappropriate in the circumstances existing here. Instead, Judge Griesa chose to follow the dissenting opinion in *Falcone*. (Tr. 218).

** In this regard, the Court below credited the testimony of Agent Nalley that Judge Gurfein had physically sealed the carton containing the tapes that were brought to him, initialled the seals on that carton and ordered that the carton remain in the custody of the Federal Bureau of Investigation. (Tr. 238). Nonetheless, Judge Griesa found this procedure to be insufficient because Judge Gurfein had not executed a *written* order regarding the custody of the tapes and had not made a *written* record of the proceeding, except for the initialling of the seals. (Tr. 220).

5. The Court found that the affidavits supporting the seven wiretap orders sufficiently explained the inadequacy of alternative non-wiretap investigative techniques. (Tr. 221).

6. Judge Griesa concluded that these affidavits contained—"to say the least"—sufficient demonstrations of probable cause to support the authorization of these wiretaps. (Tr. 222).

7. The Court rejected the defendants' contention that a delay in serving several defendants with inventories under two of the orders warranted suppression of the tapes obtained pursuant to those orders. (Tr. 222-23).

8. Finally, the Court rejected the defendants' claim that there had been inadequate judicial supervision over these wiretapping operations. (Tr. 223-24).

ARGUMENT

The District Court improperly suppressed the wiretap evidence.

Judge Griesa erred below when he chose to apply the suppression provision of Title 18, United States Code, Section 2518(8)(a)—which mandates suppression of tapes in the *absence* of a judicial seal—instead of the general suppression provision of Section 2518(10)(a)—which properly applies whenever, as here, there has been a delay in obtaining a judicial seal. The suppression of these tapes is an unwarranted sanction under this latter provision, especially since, as the Court determined below, the Government had substantially fulfilled the purposes of the wiretap statute by maintaining the integrity and confidentiality of the tapes. The exclusionary rule applied by the Court below is especially harsh and inappropriate here because

the defendants have shown no prejudice from the delay in judicial sealing, the Government has gained no advantage from that delay and steps have been taken to prevent the recurrence of such delays.

In addition, with respect to the tapes obtained under the November 10, 1972 Gurfein order, there was no delay in making these tapes available to Judge Gurfein for sealing, since they were turned over by Agent Nalley within the extension period of the November 10, 1972 order. Moreover, these tapes may not be suppressed solely by reason of the failure of Judge Gurfein to execute a *written* sealing order, as no such procedure is mandated in the wiretap statutes.

The Government concedes that there was delay in obtaining the judicial sealing of all of the tapes, except those intercepted under the November 10, 1972 Gurfein order. While this delay amounts to a technical violation of Section 2518(8)(a), the suppression of the tapes as a sanction for this violation is a harsh and wholly unnecessary deterrent which has been held to be unwarranted and inappropriate.

Section 2518(8)(a) provides in part:

> "Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his direction . . . . The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be prerequisite for the use or disclosure of the contents of any wire communication or evidence derived therefrom . . ."

It was established at the hearing below that all of the tapes derived from the seven wiretap orders were made

available for sealing to the respective issuing judges and were sealed and maintained in accordance with the directions of each judge. In suppressing these tapes, Judge Griesa disregarded the existence of these seals and interpreted the phrase "seal provided for by this subsection" to include *only* judicial seals issued *immediately* upon the expiration of the issuing order, or its extension. In effect, Judge Griesa concluded that there was no difference between a tape that had been sealed by the issuing judge after a delay and one which had never been sealed at all.

This conclusion failed to give proper effect to the sealing orders of the six judges who belatedly received and sealed these tapes. While the delays in presentment were undoubtedly relevant to the judges' decisions whether to issue sealing orders or not,* those delays were removed as a factor for the consideration of Judge Griesa at the time the judges accepted the integrity of the tapes by sealing them pursuant to Section 2518(8)(a).**

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* In fact, each of these sealing orders did contain the finding of the issuing judge that he or she was "satisfied by the annexed affidavits of . . . Edward M. Shaw and Special Agent Richard A. Nalley that the original tape recordings of all conversations made pursuant to the . . . order of this Court have been maintained in a sealed condition by the Federal Bureau of Investigation . . . from a point in time no later than immediately following the expiration date of the order until the present. . ." (Government's Appendix, at A-57 through A-93).

** See, for example, *United States* v. *Denisio*, 360 F. Supp. 715 (D. Md. 1973). In *Denisio*, the Court considered the effect of an undue government delay in obtaining a judicial order under Section 2517(5), which, the statute provides, must be obtained "as soon as practicable." The Court held that the tapes should not be suppressed by reason of the delay because "[w]hile the timeliness of the application is one consideration which the Circuit Judge may consider in deciding whether to sign the subsequent order, it is irrelevant to the ascertainment of the legality of the original order . . ." 360 F. Supp. at 720.

In *United States* v. *Falcone*, *supra*, the Government delayed for forty-five days the presentment of tapes for judicial sealing. In considering whether the use of these tapes should have been suppressed at the trial, the Court of Appeals did not find that the delay in sealing had automatically triggered the suppression provision in Section 2518(8)(a).

> "There is no doubt but that the tapes were not sealed in accordance with the statute. However, it does not follow therefrom that the evidence obtained must be suppressed. As in *United States* v. *Giordano*, *supra*, and *United States* v. *Chavez*, *supra*, we must look to the statutory scheme to determine if Congress has provided that suppression is required for this procedural error." 505 F.2d at 483.

The "statutory scheme" relied upon by the Court was Section 2518(10)(a)(i), which provides for the suppression of "unlawfully intercepted" communications,* and *not* Section 2518(8)(a).

> "The sealing requirement is in nowise 'to limit the use of interception procedures. . . .' Rather, its function is to maintain the integrity of the tapes for evidentiary purposes. We conclude, therefrom, that the sealing requirement is not to limit the use of interception procedures, and, that failure to seal promptly does not render the communication 'unlawfully intercepted,' and therefore such failure does not necessitate suppression under the statute." 505 F.2d at 483-484.

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* Under Section 2518(10)(a), suppression is required when:

"(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval."

Significantly, the Court in *Falcone* recognized that if Congress intended to allow the use of unsealed tapes at trial upon a satisfactory explanation for the absence of a seal, it would follow from such an alternative that Congress could not have intended "as a matter of law" automatic suppression of tapes where there is merely a delay in obtaining the judicial seal. 505 F.2d at 484.

Consequently, the Court held that

> ". . . where the trial court has found that the integrity of the tapes is pure, a delay in sealing the tapes is not, in and of itself, sufficient reason to suppress the evidence obtained therefrom." 505 F.2d at 484.

Similarly, in *United States* v. *Lawson*, cited but not reported at 521 F.2d 1404, Docket Nos. 74-1902, 1906 (7th Cir. August 20, 1975),* the Court of Appeals for the Seventh Circuit, faced with an identical violation of Section 2518(8)(a), refused to suppress tapes in spite of the Government's failure to effect immediate sealing. In *Lawson*, the Court found that where the Government proved that an agent had sealed the wiretap tapes immediately after interception and these seals remained intact until the time of trial, a fifty-seven day delay in presenting the tapes to a judge did not require suppression.

> "We are troubled, however, by the delay of fifty-seven days from the expiration of the interception order to the presentation of the tapes to a judge for sealing. The statute requires that this presentation occur 'immediately' and 'fifty-seven days' is not insignificant. We do not assign error to the failure to suppress the tap evidence on this ground because the appellants have not questioned the integrity of the tapes. The purpose of the

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* the text of *Lawson* is reproduced in full in the Government's Appendix, at A-13 through A-26.

> statute to insure the integrity of the tapes, thus, was accomplished." *United States* v. *Lawson*, *supra*, slip op. at 9.

The *Falcone* and *Lawson* decisions are entirely consistent with the Supreme Court's construction of Section 2518(10)(a)(i) in *United States* v. *Giordano*, 416 U.S. 505 (1974) and *United States* v. *Chavez*, 416 U.S. 562 (1974). In *Chavez*, the Supreme Court held that the harsh sanction of suppression is appropriate only as to violations of those " 'statutory requirements that directly and substantially implement the Congressional intention to limit the use of interception procedures to those situations clearly calling for the employment of this extraordinary investigative device.' " *Id.* at 575, *quoting United States* v. *Giordano*, *supra*, 416 U.S. at 527. Section 2518(8)(a), of course was enacted by Congress primarily to ensure the integrity, identity and contents of tapes *after interception* and to protect their confidentiality, *see* S. Rep. No. 1097, 90th Cong., 2d Sess., reported in 1968 *U.S. Code Cong. & Admin. News*, 2193-2194; *United States* v. *Falcone*, *supra*; *United States* v. *Lawson*, *supra*, not to "limit the use of interception procedures". *United States* v. *Chavez*, *supra*. Consequently, according to *Chavez* and *Giordano*, the suppression of tapes in the circumstances presented here is not warranted.

Moreover, the suppression of tapes because of delays in sealing is inappropriate where there has been no showing of prejudice to the defendants and no showing that the integrity of the tapes has been violated. *See United States* v. *Sklaroff*, 506 F.2d 837 (5th Cir. 1975); *United States* v. *Falcone*, *supra*; *United States* v. *Lawson*, *supra*. In this regard, Judge Griesa's suppression of this wiretap evidence was excessive in view of his finding that the integrity and confidentiality of these tapes had been maintained and in view of the fact that the Government's technical violation of Section 2518(8)(a) had neither prejudiced the defendants nor benefitted that Government.

Cf. United States v. *Burke*, 517 F.2d 377 (2d Cir. 1975); *United States* v. *Ravich*, 421 F.2d 1196 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970).

Furthermore, the Government has taken affirmative steps to ensure that similar sealing violations will not occur in the future. In March, 1975 the Department of Justice instituted a "tickler" system, whereby a clerk in the Special Operations Unit of the Department of Justice telephones the supervising attorney in the field on the expiration date of every wiretape authorization. The supervising attorney is reminded of his duty under the statute to present the tapes immediately to the issuing judge for sealing. In addition, the Chief of the Organized Crime and Racketeering Section of the Department has distributed a special bulletin to the attorneys in charge of all strike forces and field offices reminding those attorneys and their staffs of their obligation to present tapes immediately for sealing.

Even assuming *arguendo* that Judge Griesa was correct in his ruling that a technical violation of Section 2518(8)(a) may require the suppression of some of these tapes, no such violation exists with respect to the tapes obtained under the November 10, 1972 order of Judge Gurfein. Thus, the suppression of these tapes pursuant to Section 2518(8)(a) was error. It is apparent from the record that these tapes were in fact returned for sealing to Judge Gurfein prior to the expiration of the extension period for that order. Judge Griesa in crediting the testimony of Agent Nalley, found that Judge Gurfein did seal and initial the carton containing these tapes. Therefore, there was absolutely no defect in the sealing procedure that might even arguably trigger the suppression provision in Section 2518(8)(a).

So too, the conclusion of the Court below that Judge Gurfein's sealing procedure was defective because there

was no *written* sealing order is wholly erroneous. Judge Gurfein certainly complied with the statutory requirement that the tapes be sealed under the directions of the issuing judge. There is no statutory requirement that any particular method be used by the judge to seal the tapes and no requirement that there be a *written* sealing order. Consequently, the Government suggests that the tapes obtained under the November 10, 1972 order were timely sealed in accordance with the procedure prescribed in Section 2518(8)(a) and their suppression is totally unwarranted.

CONCLUSION

The order of the District Court should be reversed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Barbara S Ambler being duly sworn, deposes and says that She is employed in the office of the Strike Force for the Southern District of New York.

That on the 26th day of April She served 2 copies of the within brief and appendix by placing the same in a properly postpaid franked envelope addressed:

to all Counsel, per attached list

And deponent further says that She sealed the said envelopes and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Barbara S. Ambler

Sworn to before me this
26TH day of April, 1976

Steven K. Frankel

STEVEN K. FRANKEL
Notary Public, State of New York
No. 24-4607105
Qualified in Kings County
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